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No. 76-625

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT EVERETT HUNTLEY and
GIPSON F. HEMPHILL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 535 F. 2d 1400.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1976. A petition for rehearing and rehearing *en banc* was denied on October 4, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on November 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was reversible error for the verdict against petitioners in a non-jury trial on stipulated facts to be returned by the court in petitioners' absence.

2. Whether petitioners were denied a fair trial because they were represented by the same counsel at trial.

STATEMENT

Following a jury-waived trial on stipulated facts, petitioners were convicted in the United States District Court for the Northern District of Texas of interstate transportation of stolen property valued in excess of $5,000, in violation of 18 U.S.C. 2314, of interstate transportation of forged securities, also in violation of 18 U.S.C. 2314, of making false statements to obtain loans from banks insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. 1014, and of conspiring to commit those crimes, in violation of 18 U.S.C. 371. Each was sentenced to concurrent terms of five years' imprisonment on the conspiracy count, ten years' imprisonment on the transportation counts, and two years' imprisonment on the false statement count. The court of appeals affirmed in an opinion on which we largely rely (Pet. App. A).

The facts are not in dispute and are set forth in the opinion of the court of appeals (Pet. App. A 2-3). They show that petitioners engaged in a far-reaching check "kiting" scheme involving five banks (one of which was rendered insolvent due to petitioners' fraudulent activities) and some $7,000,000 in unpaid (and unsecured) drafts and checks.[1]

ARGUMENT

1. Following petitioners' waiver of trial by jury and the submission of the case to the district court on stipulated testimony, the court studied and determined the case in chambers. It did not call petitioners before the bench to announce that, as the trier of fact, it had found them guilty. Petitioners contend that this procedure

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[1]See page 7 of the government's brief on appeal (a copy of which we are lodging with the Clerk of this Court).

violated Rule 43(a), Fed. R. Crim. P., which provides that "[t]he defendant shall be present * * * at every stage of the trial including * * * the return of the verdict * * *."

The requirement that a defendant be present at "the return of the verdict" has no application in the case of a trial to the court, where there is no verdict. A verdict is "[t]he formal and unanimous decision or finding made by a jury, impaneled and sworn for the trial of a cause, and reported to the court (and accepted by it), upon the matters or questions duly submitted to them upon the trial." Black's *Law Dictionary* 1730 (4th ed. 1968). See also Rule 31(a), Fed. R. Crim. P. ("The verdict shall be unanimous. It shall be returned by the jury to the judge in open court."); Rule 33, Fed. R. Crim. P. ("A motion for a new trial based on any other grounds [than newly discovered evidence] shall be made within 7 days after verdict or finding of guilty * * *."). Cf. *United States* v. *Kopp*, No. 75-1536, decided December 6, 1976, recognizing a distinction between "a general finding of guilt rendered by the court in a bench trial" and "a return of a verdict of guilty by a jury."

A defendant's presence at the return of the verdict "is important presumably because of the defendant's right to poll the jury." 8B Moore's *Federal Practice* para. 43.03[3], p. 43-23 n. 13 (2d ed. 1976). See Rule 31(d), Fed. R. Crim. P. A defendant has no corresponding right to "poll the court," and accordingly the defendant's presence at the stage in a non-jury trial that corresponds to the return of the verdict in a jury trial is unnecessary.

Finally, even if Rule 43(a) applied here, and was violated, any violation was harmless, for the reasons stated by the court of appeals (Pet. App. 8-10).

2. Petitioners jointly retained one attorney to represent them in the trial court. They now contend (Pet. 18) that he rendered them both inadequate representation because "the

joint representation prohibited him from pursuing alternative defenses that would have been available if he had not been fettered." Petitioners do not, however, suggest what alternative defense would have been available to either of them had they retained two lawyers rather than one. In the court of appeals they suggested that separate counsel might have been able to exploit possible differences in the degree of their criminal intent, but, as the court of appeals observed (Pet. App. 14), petitioners could point "to no specific evidence which was or might have been introduced to show lack of criminal intent on the part of either of them." In short, petitioners have made no showing that the joint representation was inadequate in any way as to either one of them or that they had any conflicting interest that might have been compromised by the joint representation.

There is, accordingly, no occasion here to accede to petitioners' suggestion that the Court grant certiorari to resolve the differences among the circuits regarding the nature of the duty of the trial court, in cases where one lawyer represents several co-defendants, to advise the defendants of their right to separate counsel and to warn them and inquire into their understanding of the dangers of a possible conflict of interest.[2] Petitioners, sophisticated businessmen, can hardly be said to have been ignorant of their right to employ separate counsel, and indeed they do not contend otherwise. Nor do they contend that the attorney whom they retained did not advise them of the possibility of a conflict, or that they were in any event unaware of such a possibility. Finally, even in those circuits having a rule of district court inquiry in every case, there is

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[2]Compare, *e.g.*, *United States* v. *Foster*, 469 F. 2d 1, 4-5 (C.A. 1), and *United States ex rel. Hart* v. *Davenport*, 478 F. 2d 203, 211 (C.A. 3), with, *e.g.*, *United States* v. *Boudreaux*, 502 F. 2d 557, 558 (C.A. 5), and *United States* v. *Kutas*, 542 F. 2d 527 (C.A. 9), certiorari denied January 25, 1977 (No. 76-575).

no reason to believe that claims of prejudice as insubstantial and speculative as petitioners' would gain reversal.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]We note that, although petitioners secured different counsel on appeal, they are jointly represented in this Court by a single attorney, further suggesting that neither petitioner has a defense available to him that is inconsistent with the best interests of the other.